

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

TIMOTHY P. KEARNEY, JR,	)	
	)	CIVIL ACTION NO. 05-10095-RWZ
Plaintiff,	)	
	)	
v.	)	
	)	
THE MAY DEPARTMENT STORES	)	
COMPANY a/k/a FILENE'S, GREGORY	)	
JACKSON, ERIC VAN DER VALK,	)	
AND SHAWN TUBMAN,	)	
	)	
Defendants.	)	

**DEFENDANTS' MOTION TO COMPEL DISCOVERY**

Now come the defendants (The May Department Stores Company a/ka Filene's, Gregory Jackson, Eric Van Der Valk and Shawn Tubman), and pursuant to Fed. R. Civ. P. 37(a), hereby move for an order compelling the plaintiff to respond, on or before November 11, 2005, to written discovery that was served by the defendants, and to appear for his deposition to be conducted during the week of November 14, 2005. As grounds for the allowance of this motion the defendants state as follows:

1. The plaintiff alleges employment discrimination. The plaintiff is pro se. Returns of service with respect to the defendants were filed in March 31, 2005 and on various dates in April 2005. The defendants answered the complaint on May 5, 2005.
2. The court conducted a Scheduling Conference on June 15, 2005. At said conference, the Court set the following deadlines: Discovery due by November 28, 2005; further conference December 28, 2005.
3. On June 21, 2005, the defendants served the plaintiff with interrogatories, a request for production of documents and a set of requests for admissions (Letter to Mr.

Kearney dated June 21, 2005, Exhibit A). At that time the defendants also noticed the plaintiffs deposition for August 31, 2005 and advised Mr. Kearney that the defendants required the plaintiff to serve answers/responses to the written discovery prior to the date of the deposition. (Id.).

4. As of mid August 2005, the plaintiff had not answered/responded to the defendants' discovery. Therefore, on August 23, 2005, counsel for the defendant wrote Mr. Kearney (Exhibit B), to request answers/responses to the discovery in advance of the scheduled deposition date.
5. Thereafter, Mr. Kearney called counsel for the defendant (during the week of August 22, 2005) to advise that his deposition could not go forward on August 31, 2005 because he would be traveling out of town and would be unavailable.
6. On August 30, 2005, counsel for the defendants once again wrote Mr. Kearney (Exhibit C), pursuant to Local Rules, in an effort to resolve the issues arising from the plaintiff's ongoing failure to answer/respond to written discovery and to request possible dates for the deposition of the plaintiff so the same could be erscheduled.
7. Not having received any response/cooperation from Mr. Kearney, counsel for the defendant wrote follow-up letters to Mr. Kearney on October 4, 2005 (Exhibit D) and October 12, 2005 (Exhibit E), in a continuing effort to resolve this dispute. Nevertheless, the plaintiff still refuses to respond to the correspondence of defense counsel, has not answered/responded to the defendants written discovery and has not provided dates for his deposition.
8. A litigant's pro se status does relieve the litigant of his/her obligation to comply with the Federal Rules of Civil Procedure and the procedural rules of the district court.

F.D.I.C. v. Anchor Properties, 13 F.2d. 27 (1<sup>st</sup> Cir. 1994). The defendants have been pursuing written discovery and the deposition of the plaintiff since within a few days of the Scheduling Conference. Nevertheless, the plaintiff has failed to provide written discovery to the defendants and has not responded to the many efforts by the defendants to resolve this issue short of a motion to compel. Given the approaching discovery deadline of November 28, 2005, the defendants respectfully request that the Court enter an order compelling the plaintiff to answer/respond to the written discovery served by the defendants (interrogatories/request for production/request for admission) on or before November 11, 2005, and directing the plaintiff to appear for his deposition to be conducted during the week of November 14, 2005. The defendants further request that said Order advise that this case shall be subject to dismissal for failure to provide discovery in the event that the plaintiff does not fully comply with the Court's discovery order.

Respectfully submitted,

MARTIN, MAGNUSON, McCARTHY &  
KENNEY

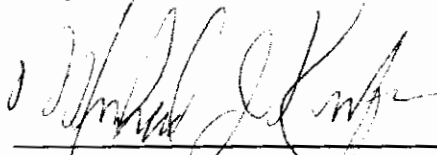
By: 

Michael J. Keefe, BBO No. 263751  
101 Merrimac Street, 7<sup>th</sup> Floor  
Boston, MA 02114  
Phone (617) 227-3240  
Fax (617) 227-3346  
Attorney for Defendants.

**CERTIFICATION PURSUANT TO LOCAL RULES**  
**7.1(A)92) AND 37.1**

The undersigned certifies that prior to filing the above motion, I attempted in good faith to confer with the pro se plaintiff in an effort to narrow or resolve this dispute, but the plaintiff has not responded to my requests for a discovery conference.

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed first class, postage prepaid to Timothy P. Kearney, Jr., Pro Se, 100 Everett Street, Arlington, MA 02747 this 31st day of October, 2005.

A handwritten signature in black ink, appearing to read "Michael J. Keefe", is written over a horizontal line.

Michael J. Keefe, BBO No. 263751  
101 Merrimac Street, 7<sup>th</sup> Floor  
Boston, MA 02114  
Phone (617) 227-3240  
Fax (617) 227-3346  
Attorney for Defendants.

A

MARTIN, MAGNUSON, MCCARTHY & KENNEY

ATTORNEYS AT LAW

101 MERRIMAC STREET

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OF COUNSEL  
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CLEMENT MCCARTHY (1951-1985)

\*ALSO ADMITTED IN CT  
\*\*ALSO ADMITTED IN PA  
+ALSO ADMITTED IN RI  
+ALSO ADMITTED IN DC  
+ALSO ADMITTED IN NY  
+ALSO ADMITTED IN OH

June 21, 2005

Certified Mail, Return Receipt Requested

Timothy P. Kearney, Jr., Pro Se  
100 Everett Street  
Arlington, MA 02474

Re: Timothy P. Kearney, Jr., Pro Se  
Vs.: The May Department Stores a.k.a Filene's, et al  
C. A. No.: 05-10095-RWZ

Dear Mr. Kearney:

We are enclosing herewith the following:

1. Defendant's First Request for Production of Documents Directed to Plaintiff; Timothy P. Kearney, Jr.;
2. Defendant's First Request for Admissions Directed to Plaintiff, Timothy P. Kearney, Jr.;
3. Defendant's First Set of Interrogatories Directed to Plaintiff, Timothy P. Kearney, Jr.; and
4. Notice of Taking Videotape Deposition of Timothy P. Kearney, Jr.

We have scheduled your deposition for August 31, 2005. We will work with you to reschedule the deposition if said date is not convenient for you. We will require your written answers/responses to the enclosed discovery requests before the deposition.

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MARTIN, MAGNUSON, MCCARTHY & KENNEY

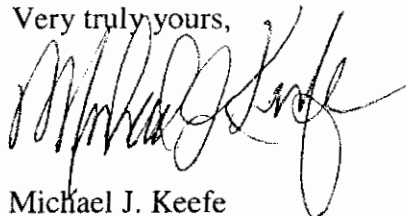
Timothy P. Kearney, Jr., Pro Se

-2-

June 21, 2005

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael J. Keefe", written in a cursive style.

Michael J. Keefe

MJK/jh

Enclosures

Cc: Michael Franklin, Esq.,

**B**



MARTIN, MAGNUSON, MCCARTHY & KENNEY  
ATTORNEYS AT LAW  
101 MERRIMAC STREET  
BOSTON, MASSACHUSETTS 02114-4716  
TELEPHONE: (617) 227-3240  
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## ALSO ADMITTED IN NY  
\* ALSO ADMITTED IN OH

August 23, 2005

Certified Mail, Return Receipt Requested

Timothy P. Kearney, Jr., Pro Se  
100 Everett Street  
Arlington, MA 02474

Re: Timothy P. Kearney, Jr., Pro Se  
Vs.: The May Department Stores a.k.a Filene's, et al  
C. A. No.: 05-10095-RWZ

Dear Mr. Kearney:

As you recall, on June 21, 2005, we served written discovery requests (interrogatories, request for production and requests for admissions), together with a notice scheduling your audio-visual deposition for August 31, 2005.

The above referenced letter advised that we required your written answers/responses to the enclosed discovery requests in advance of the deposition.

The time for you to answer/respond to the discovery we served has now expired but you have not served answers to the interrogatories or responses to the document requests or to the requests for admissions. We must have your answers/responses in hand on or before August 26, 2005 if your deposition is to go forward on August 31, 2005. If we have not received your answers/responses by August 26, 2005, we will be unable to conduct your deposition on August 31, 2005, and we will re-schedule the deposition and file a motion to compel discovery.

Please call me on receipt of this letter to discuss this matter. In my absence, please speak with Julia Hardigan.

Kindly consider this letter initiation of a conference pursuant to LR 7.1(A)(2) intended to resolve or narrow the issues discussed above.

MARTIN, MAGNUSON, MCCARTHY &amp; KENNEY

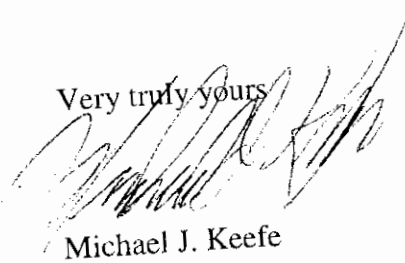
August 23, 2005

Timothy P. Kearney, Jr., Pro Se

-2-

Thank you for your courtesy.

Very truly yours



Michael J. Keefe

MJK/mjk

Cc: Michael Franklin, Esq.

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>		<p>A. Signature  <input checked="" type="checkbox"/> <i>T. Kearney</i> <input type="checkbox"/> Agent  <input type="checkbox"/> Addressee</p>	
<p>1. Article Addressed to:</p> <p><i>Timothy Kearney Pro Se</i>  <i>100 Everett St.</i>  <i>Arlington, MA 02474</i></p>		<p>B. Received by (Printed Name)  <i>T. Kearney</i></p>	<p>C. Date of Delivery</p>
		<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes  <input checked="" type="checkbox"/> No          If YES, enter delivery address below:</p>	
		<p>3. Service Type</p> <p><input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail  <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise  <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p>	
		<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	
<p>2. Article Number          (Transfer from service label)</p>		<p>7005 0390 0005 5941 0484</p>	

C

MARTIN, MAGNUSON, McCARTHY & KENNEY

ATTORNEYS AT LAW

101 MERRIMAC STREET

BOSTON, MASSACHUSETTS 02114-4716

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•ALSO ADMITTED IN OH

August 30, 2005

Certified Mail, Return Receipt Requested

Timothy P. Kearney, Jr., Pro Se  
100 Everett Street  
Arlington, MA 02474

Re: Timothy P. Kearney, Jr., Pro Se  
Vs.: The May Department Stores a.k.a Filene's, et al  
C. A. No.: 05-10095-RWZ

Dear Mr. Kearney:

We are writing to confirm that your deposition will not go forward as noticed on August 31, 2005. You called last week and advised that the deposition could not proceed on said date because you would be traveling out of town and unavailable.

Please call us to provide possible dates for your deposition.

Also, please be reminded that we have not received any response from you to our letter dated August 23, 2005 and discussing your failure to answer/respond to written discovery served on you on or about June 21, 2005.

If we do not receive your answers/responses to the written discovery by September 21, 2005, we intend to file a motion seeking an Order from the court compelling discovery or providing other relief.

Kindly consider this letter initiation of a conference pursuant to LR 7.1(A)(2) and 37 and intended to resolve or narrow the issues discussed above.

MARTIN, MAGNUSON, MCCARTHY & KENNEY

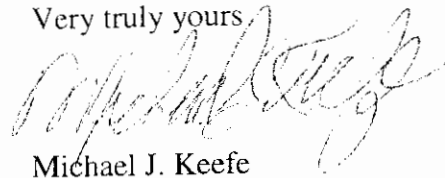
Timothy P. Kearney, Jr., Pro Se

-2-

August 30, 2005

Thank you for your courtesy.

Very truly yours



Michael J. Keefe

MJK/mjk

Cc: Michael Franklin, Esq.


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1. Article Addressed to:

Timothy P. Kearney, Jr., Pro Se  
100 Everett Street  
Arlington, MA 02474

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A. Signature  ☐ Agent  
☐ Addressee  
B. Received by (Printed Name) 09012005 C. Date of Delivery

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If YES, enter delivery address below: ☐ No

2. Service Type  
☐ Certified Mail ☐ Express Mail  
☒ Registered ☐ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.  
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PS Form 3811, February 2004

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Total Postage & Fees	\$

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City, State, ZIP+4

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MARTIN, MAGNUSON, MCCARTHY & KENNEY

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101 MERRIMAC STREET

BOSTON, MASSACHUSETTS 02114-4716

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•ALSO ADMITTED IN OH

October 4, 2005

Certified Mail, Return Receipt Requested

Timothy P. Kearney, Jr., Pro Se  
100 Everett Street  
Arlington, MA 02474

Re: Timothy P. Kearney, Jr., Pro Se  
Vs.: The May Department Stores a.k.a Filene's, et al  
C. A. No.: 05-10095-RWZ

Dear Mr. Kearney:

As you recall, on June 21, 2005, we served written discovery requests (interrogatories, request for production and requests for admissions), together with a notice scheduling your audio-visual deposition for August 31, 2005.

On August 23, 2005 we wrote to you to advise that the time for you to answer/respond to the discovery we served had expired but you have not served answers to the interrogatories or responses to the document requests or to the requests for admissions. In our letter we requested that you provide your answers/responses on or before August 26, 2005 if so that your deposition could go forward as noticed on August 31, 2005.

On August 30, 2005, we wrote to confirm your call advising that your deposition could not proceed August 31, 2005 because you had advised that you would be traveling out of town and unavailable. In that letter, we asked that you call us to provide possible dates for your deposition.

The discovery deadline in this case is November 30, 2005. As of this date, you still have not served answers/responses to the written discovery that was served on you and you have yet to contact us to discuss dates for your deposition.

If you no longer intend to proceed with this matter, please sign and return to us the enclosed Stipulation Of Dismissal. We have provided a self addressed stamped



MARTIN, MAGNUSON, MCCARTHY &amp; KENNEY

Timothy P. Kearney, Jr., Pro Se

-2-

October 4, 2005

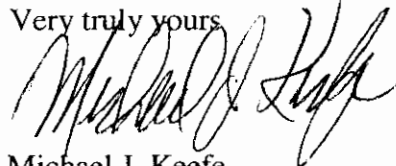
envelope for your convenience. On receipt of a signed Stipulation Of Dismissal from you, we will sign the same and file it with the Court (copying you), and this matter will be concluded.

On the other hand, if you intend to continue to pursue this matter, we must receive your answers/responses to the written discovery by October 10, 2005. If we do not receive the same by said date we will file a motion with the court seeking such relief as we deem appropriate including possible dismissal of this action.

Kindly consider this letter initiation of a conference pursuant to LR 7.1(A)(2) intended to resolve or narrow the issues discussed above.

Thank you for your courtesy.

Very truly yours,



Michael J. Keefe

MJK/mjk

Cc: Michael Franklin, Esq.

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Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

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Sent To Kearney  
 Street, Apt. No.,  
 or PO Box No.  
 City, State, ZIP+4

2. Article Number 7005 0390 0005 5941 0590  
 (Transfer from PS Form 3811, February 2004)

Domestic Return Receipt

102595-02-M-14

Timothy P. Kearney, Jr., Pro Se  
 100 Everett Street  
 Arlington, MA 02474

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  - Attach this card to the back of the mailpiece, or on the front if space permits.

3. Service Type
- ☒ Certified Mail ☐ Express Mail
- ☐ Registered ☒ Return Receipt for Merchandise
- ☐ Insured Mail ☐ C.O.D.
4. Restricted Delivery? (Extra Fee) ☐ Yes

- A. Signature [Signature]
- B. Received by (Printed Name) Tim Kearney
- C. Date of Delivery 10/4/05
- D. Is delivery address different from item 1? ☐ Yes ☐ No
- If YES, enter delivery address below:

SENDER: COMPLETE THIS SECTION

COMPLETE THIS SECTION ON DELIVERY

0650 1465 5000 0660 5002



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MARTIN, MAGNUSON, McCARTHY & KENNEY  
ATTORNEYS AT LAW  
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\*ALSO ADMITTED IN OH

October 12, 2005

Timothy P. Kearney, Jr., Pro Se  
100 Everett Street  
Arlington, MA 02474

Re: Timothy P. Kearney, Jr., Pro Se  
Vs.: The May Department Stores a.k.a Filene's, et al  
C. A. No.: 05-10095-RWZ

Dear Mr. Kearney:

We are enclosing herewith a copy of our letter to you dated October 4, 2005. Said letter raises issues arising from your ongoing failure to provide discovery to the defendants.

The October 4, 2005 letter was mailed to you certified mail, return receipt requested. As of this follow-up letter, we have not yet received the return receipt pertaining to the delivery of the October 4, 2005 letter. Hence, we are enclosing a copy of the October 4, 2005 letter herewith in the event that it has not yet been delivered or you have not accepted delivery of the letter.

Please call us no later than October 14, 2005 to discuss the issues set forth in our October 4, 2005 letter. In the event that we have not heard from you by said date, we will file a motion with the court seeking such relief as is appropriate, including possible dismissal of this case, as a result of your failure to provide discovery.

Kindly consider this letter a further attempt to resolve the discovery issues pursuant to LR 7.1(A)(2).

MARTIN, MAGNUSON, MCCARTHY & KENNEY

Timothy P. Kearney, Jr., Pro Se

-2-

October 12, 2005

Thank you for your courtesy.

Very truly yours

A handwritten signature in black ink, appearing to read "Michael J. Keefe", written in a cursive style.

Michael J. Keefe

MJK/mjk

Cc: Michael Franklin, Esq.